

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

76-6122

To be argued by
JOHN F. PICCIANO

United States Court of Appeals

FOR THE SECOND CIRCUIT

COUNTY OF SUFFOLK, COUNTY OF NASSAU, TOWN OF ISLIP, TOWN OF HEMPSTEAD, TOWN OF NORTH HEMPSTEAD, TOWN OF OYSTER BAY, TOWN OF HUNTINGTON, and the BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON AND CONCERNED CITIZENS OF MONTAUK, INC.,

Appellees,

—against—

SECRETARY OF THE INTERIOR, et al.,

Appellants,

NATIONAL OCEAN INDUSTRIES ASSOCIATION, et al.,
and NEW YORK GAS GROUP,

Intervenor-Appellants.

THE STATE OF NEW YORK and THE NATIONAL DEFENSE COUNCIL, INC.

—against—

THOMAS S. KLEPPE, Secretary of the Interior

NATIONAL OCEAN INDUSTRIES ASSOCIATION, et al.,
and NEW YORK GAS GROUP,

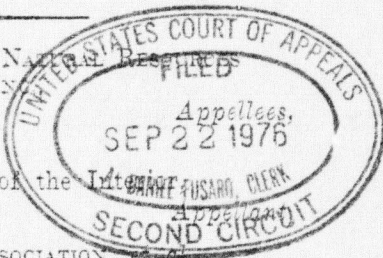
Intervenor-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE, COUNTY OF NASSAU

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6122

COUNTY OF SUFFOLK, COUNTY OF NASSAU, TOWN OF ISLIP,
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BRIEF OF APPELLEE, COUNTY OF NASSAU

Preliminary Statement

For the sake of brevity, and in lieu of a counter preliminary statement of the case and relevant facts, this Court is respectfully referred to the statement contained within the Federal District Court decision of Justice Jack Weinstein at pages 10 through 20, which represent a fair and accurate discussion of same.

Issue Presented For Review

Was the District Court's finding of fact that federal appellants failed to adequately consider the environmental effects inherent in a state-local refusal to permit pipeline landfalls and OCS support facilities within their jurisdictions "clearly erroneous" pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

Argument

It has been almost universally held that the Rule 52 provision stating that "findings of fact shall not be set aside unless clearly erroneous" requires that such findings be given a presumption of correctness. *Coleman v. U.S.*, C.A. 1949, 176 F. 2d 469, 85 U.S. App. D.C. 145; *J.A. Jones Constr. Co. v. Englert Eng. Co.*, C.A. 6th, 1971, 438 F. 2d 3.

It has been further held that a finding of fact of a federal district court should be construed liberally and found to be in consonance with the judgment below. *Zimmerman v. Montour R. Co.*, C.A. 3d, 1961, 296 F. 2d 97, Cert. denied 82 S. Ct. 845, 369 U.S. 828. The burden of establishing specifically where the lower court's findings are clearly erroneous is upon appellant. *Arkansas Ed. Ass'n v. Portland Bd. of Ed.*, C.A. 8th, 1971, 446 F. 2d 763. It is re-

spectfully submitted that based upon the reasoning hereinbelow, appellants have failed to satisfy this burden.

The basic flaw in appellants' argument that "... the issue of land use control is the one least susceptible to prediction and analysis now" (federal appellants' brief, p. 14) is the false underlying belief that the District Court decision of Justice Weinstein required that this so-called "political issue" be analyzed and discussed in the Sale 40 EIS. On the contrary, the lower court held, and properly so, that the total range of land use and environmental implications and impacts of a state-local decision to prohibit pipeline landfalls be analyzed and discussed in the EIS—rather than the machinations behind the decision itself—or as federal appellants describe "... the vagaries of local political pressures and local decision making". (Federal appellants' brief, p. 14).

If, as the District Court has pointed out, and indeed as appellants allege was conceded in the Sale 40 EIS, there exists a possibility of a state's refusal to permit pipeline landfalls within its coastal zone, why then wasn't the NEPA mandated discussion of the environmental impacts and probable results of a refusal likewise presented within this document? The same issue was presented succinctly by the District Court in its decision at p. 54: "The issue is whether these independent powers of sovereign states, to control their own lands to prevent certain uses by private oil companies can so frustrate federal administrators' assumptions that they must be considered under NEPA".

The most critical and uncontroverted evidentiary fact presented at the hearings below, and indeed conceded on this appeal by appellants, is that the only alternative to pipeline transport of OCS oil is the sea-going oil tanker. The significance of this fact lies in the glaring disparity

between the relative oil spill rates for tankers versus OCS production—a 16:1 ratio. (Dec., p. 62). There can be little doubt that, as Justice Weinstein pointed out in his decision at page 55, “The feasibility of pipelines for transportation of oil has been a cornerstone of Mid-Atlantic OCS planning.” Acknowledging the environmentally dangerous discrepancy in the above-described oil spill ratio, as well as the established historical fact that “. . . about 90 percent of Gulf of Mexico OCS production is landed in pipeline” (Sale 40 EIS, Vol. III, p. 18), there should be little surprise or wonder at the assumption flowing throughout the record below, to wit: the “expectation” that pipelines rather than tankers will certainly bring Mid-Atlantic OCS oil and gas onshore.

The problem arising from the pervasive use of such an underlying assumption on the part of federal appellants is that it is founded upon a compounded and patently improper assumption that the adjacent coastal states will buckle under the pressures from a myriad of industry and government quarters and thereby silently acquiesce in the siting of pipelines through an area which has become, in recent years, the subject of a wave of federal, state and local protective legislation—the coastal zone.

Appellants would have this Court accept the notion that, because the “results” (i.e. a simple approval or denial of pipeline landfalls) “of such an obviously political contest cannot, at this point, be predicted”, (federal appellants’ brief, p. 14), the environmental and land use impacts of a denial per se cannot likewise be predicted. This argument, defying any attempt at deductive reasoning, must fail under the weight of its own illogic.

The issue which must be decided is not whether in point of fact the adjacent coastal states will prohibit pipeline

landfalls—admittedly only the future will settle this point—but whether a reasonable possibility exists that such will be the case.

The mere fact, in and of itself, that plaintiffs-appellees, State of New York, Nassau and Suffolk Counties, etc., have chosen to initiate and pursue this litigation should illustrate, even to the most naive, the gravity with which they view their responsibilities in protecting the coastal zone within their respective jurisdictions from the environmental impact associated with pipeline construction, siting and rupture. Indeed, the evidentiary record is replete, as well as the Sale 40 EIS volumes themselves, with discussion of many of these impacts.

The mere fact that the coastal states in recent years, preparing for the possibility of OCS production, have enacted a plethora of coastal zone legislation designed to prohibit and/or severely restrict activity within wetlands and/or environmentally significant areas in the coastal zone, should impress one, as indeed it must have impressed the District Court, with the unyielding fact that a state and local prohibition of pipeline landfalls and related OCS facilities is a very distinct possibility. Again, it may be true that predicting with certainty the outcome of what will surely be hotly contested political battles with respect to pipeline landfalls and corridor locations, is a virtual impossibility. However, the argument, (based alone upon the sampling of existing state coastal zone legislation for Maryland, New York, New Jersey, Delaware and Pennsylvania, cited by Judge Weinstein in the appendix to his decision), that a distinct and reasonable possibility exists that a flat prohibition of same will occur, is founded upon reason and common sense. The Secretary's failure to consider the readily discernible land-use and environmental impacts inherent in such a state's refusal to allow pipeline

landfalls thus takes on enormous proportions and implications in deciding whether the lower court abused its discretion and whether it engaged in, as appellants put it, a "crystal-ball" inquiry.

A crystal ball is hardly necessary to even cursorily examine what are the obvious impacts of a state's refusal to permit pipeline construction. The remaining alternative of tankering would bring not only the increased oil spill ratio (and adverse biological impacts associated therewith), but further impact issues not discussed in the Sale 40 EIS. For example: a) What will become of the expected vast supply of natural gas on the OCS which is not capable of being transported other than by pipeline; will it be wasted? b) What additional pressure will be brought to bear within the coastal zone for construction of deep-water "super-ports" as a result of the increased tankering traffic—with all its inherent land-use, infrastructure, construction and siting problems?

If one reads in its proper context, rather than in the isolated manner presented by appellants in their briefs, each and every statement of the Sale 40 EIS which discusses the pipeline versus tankering issue, one is logically drawn to the same conclusion reached by the court below: The underlying theme presented throughout the Sale 40 EIS is one based upon an "... assumption that the affected states would permit pipelines from the oil fields through their three miles of seabed and on-shore coastal zones". (Dec. page 56).

The Sale 40 EIS states: "It is anticipated that oil and gas produced as a result of this proposed sale will be transported to shore by pipeline. . . (Special Stipulation, Section IV E). . ." (EIS Vol. II, p. 17)). The reference to this special stipulation, Sec. IV E, relied upon heavily

by federal appellants, is particularly significant here. In spite of the alleged fact that such stipulation (which basically requires use of pipelines where "technically and economically feasible") also depends on acquiring "rights-of-way", it is used and referenced in support of a statement that pipelines are "anticipated". The obvious assumption here is that the acquiescence of the affected coastal states in permitting these "rights-of-way" is also "anticipated".

Appellants further refer to a statement in Sale 40 EIS, Vol. II, pp. 227-228 that:

"Several states possess regulations, as part of their pollution prevention programs, that would require permits and appropriate environmental analysis if proposed pipelines were to cross watercourse. New Jersey [Coastal Area Facilities Review Act (1973).] and Maryland [Coastal Facilities Review Act (1975).] have legislation that would require permitting and [sic] appropriate environmental analyses for proposed pipelines in legislatively designated portions of the coastal zone. Although local plans may be formulated that identify desirable utility corridors, rarely do zoning plans restrict pipelines to predetermined locations. Local ordinances may, however, prescribe procedures for obtaining local review and approval of proposed pipelines. Direct federal responsibility for the siting of onshore facilities is limited except for federally administered lands. Some federal regulatory responsibilities, however, could indirectly influence the siting and subsequent operation of these facilities. Essentially, federal regulatory programs can be involved, in some instances, to mitigate operational, but not locational, adverse effects. State and local planning and regulatory authorities provide the primary framework within which potential adverse effects on the onshore

facilities can be addressed. *The regulatory authority of the states has both operational and locational significance.* It is primarily the local zoning power, however, that provides the basis for affirmative action to mitigate adverse effects stemming from locational factors.

It is the intent of the Bureau to require, wherever possible, pipeline corridors in the area of this proposed sale to minimize disturbance of the environment and disruption of other uses of the OCS. Additionally, such corridors could help mitigate some of the potential impacts of on-shore facilities which could result in the absence of such comprehensive planning efforts. A proposed lease stipulation that will be include [sic] in each Mid-Atlantic oil and gas lease, will enable the Bureau to require that pipelines used to transport oil to shore be placed in designated corridors. If commercial quantities of oil are discovered, pipeline corridor management studies will be initiated to identify the least environmentally hazardous areas in which to require the placement of lines. Although these studies are primarily concerned with the OCS, they will also include areas suitable for the location of on-shore processing and support facilities, and will be coordinated with other Federal, State and local authorities.

If commercial finds of hydrocarbons are made, then pipeline corridor management studies will be conducted in two phases. The first phase will identify macro-corridors (including potential landfall areas) using existing environmental and socio-economic data. Representatives of affected states as well as the petroleum industry, will be encouraged to participate in this planning effort. Once tentative corridors have been identified the second phase of the study effort will be initi-

ated. It will consist of a BLM-funded contract study to obtain quantitative biological, chemical geological and physical oceanographic baseline data for the tentatively identified corridors. *The collected data, once analyzed, will be utilized to select the final corridors and landfall locations with the least net environmental and socio-economic adverse impacts.*" (Dec. pp. 58-60, EIS Vol. II, pp. 455-457).

It is respectfully submitted that a clear reading of the above-cited language leads only to the following improper conclusions and implications: (a) Whatever state and local regulations exist in the affected coastal states, they are designed solely to *control* and *regulate pollution* and the *siting* problems associated with pipeline construction. Nowhere is there a specific, clear or concise statement that these very states may not only regulate but may actually prohibit pipeline construction within their jurisdiction; (b) The requirement of the use of pipelines, by virtue of the above indicated special lease stipulation, depends and is based solely upon *economic feasibility* (particularly the size of the strike and recoverability of the oil), rather than a state's innate right to prohibit pipeline landfalls; and (c) The entire pipeline corridor discussion is improperly premised upon a *fait accompli* view of pipeline construction—the only real variable again, is the commercial size of the strike.

Stated simply by the District Court at page 64 of its decision: "The real bite in the environmental control exercised by states is not in their *monitoring* functions, however, but in their *licensing* capacity". (Emphasis supplied). Several of these various state statutes may have been alluded to within the Sale 40 EIS, but as the lower court has pointed out, they were hardly analyzed with any meaning-

ful discussion in terms of their potential conflict with the entire OCS production program proposed for the Mid-Atlantic area. And, as further pointed out by the District Court in its decision at page 66: "Even if the states do not prohibit oil pipelines, *they may restrict their point of entry*, requiring a landfall for examination, at the industrialized northern section of the New Jersey Coast or at the refinery areas in the tristate New Jersey-Delaware-Pennsylvania region". (Emphasis supplied). The obvious implications of this even more distinct probability relate to the issue of the "economic and technical feasibility" of pipeline construction, pursuant to the above-cited stipulation. If the various states for example, require that pipeline corridors be located in areas requiring extensive re-routing over significantly greater distances, this fact of its own sheer economic weight, will prejudice the scales in favor of tankering by rendering pipeline construction economically infeasible. This possibility, or rather probability, likewise was not discussed in the Sale 40 EIS.

As illustrated by the lower court's decision at page 67:

"If the assumption by the Secretary that pipelines will transport the oil in case of a large strike would have been different had the state situation been brought home to him, then the entire NEPA decision-making process is invalidated. Misplaced reliance on such a material proposition raises a question as to the adequacy of the NEPA documents and the reliability of the Secretary's decision."

As was well illustrated by Justice Weinstein, the appropriateness of granting injunctive relief becomes self evident where a significant substantive or procedural violation of NEPA has been shown. The resulting harm in allowing a major federal action such as OCS production to

proceed in the face, and in spite, of the proved NEPA violation completely aborts and circumvents the Congressional mandate that the NEPA process insure informed decision-making. Anderson, *NEPA in the Courts*, 239 (1973); *Scheer v. Volpe*, 466 F. 2d 1027 (7th Cir. 1972); *Environmental Defense Fund v. TVA*, 468 F. 2d 1164 (6th Cir. 1972); *Izaak Walton League of Amer. v. Schlesinger*, 337 F. Supp. 287, (D.C. 1971).

The significance of granting judicial sanction to the continuance of such an enormous OCS venture in the Mid-Atlantic, in the face of a proved violation of NEPA, was illustrated ad nauseum through the testimony of plaintiffs' witness, Dr. Mitchell, at the hearing below. The court summed up the land use impacts anticipated prior to production at page 74 of its decision:

"In any event, once a strike is made many of the corollary activities will begin, regardless of whether or not the states or federal government has approved production plans. These include siting, construction and operation of platform yards, pipe coating plants and other installations, and land acquisition for new or expanded refineries. *This commitment of resources is of the precise sort that should not take place before compliance with NEPA.*" (Emphasis supplied.)

Well prior to a strike being made, there will be, and indeed have already occurred, enormous capital investments, land acquisitions and corollary costs—in short, a massive "gearing-up" operation on the part of the oil-related industries and, more importantly, a "girding-up" operation on the part of state and local governments within the coastal zone. The longer appellants are allowed to proceed towards production, before complying with NEPA, the deeper and more irrevocable will become the commit-

ment, by both industry and government, of resources necessary for a successful OCS production program.

To state, as did appellants, throughout the hearing and arguments below, that land-use impacts associated with pipeline construction and related industry activity are not subject to prediction, merely begs the question. Council on Environmental Quality Guidelines, with respect to the preparation of environmental impact statements, demand that:

"As early as possible and in all cases *prior* to agency decision concerning recommendations . . . federal agencies will . . . *assess in detail* the potential environmental impact." 40 CFR §1500.2(a) (Emphasis supplied).

Appellants claim that it is impossible to determine the impact of pipeline construction in any detail whatsoever because the size of the eventual oil and gas strike is unknown. In spite of this convenient disclaimer, which by any definition is lame, Dr. Mitchell, in extensive and laborious detail, informed the lower court of these precise details, using as a guideline, the very limits of the anticipated strike referenced by the federal appellants throughout the Sale 40 EIS, to wit: 0.4-1.4 billion barrels of oil. It is significant to note that one of the federal appellants' witnesses, offered in rebuttal to Dr. Mitchell, Mr. Wenstrom, readily conceded that any pipeline construction associated with OCS development carries with it "severe land impacts". Mr. Wenstrom further conceded that, as a planning premise or objective, it would be good for the state planners, especially within the coastal zones, to know where pipeline corridors will be located before they are fixed. Yet, and in spite of his above-cited testimony, Mr. Wenstrom, in a conflicting statement, further admitted that he

did not deem it "reasonable" or "necessary" to address these "severe" land use impacts within the Sale 40 EIS (even within a simple high-low range of the acreage that might be required for these corridors). (Tr. 2504-2506).

This one piece of testimony, when read together with that of Dr. Mitchell, clearly reveals a fatal flaw in appellants' reasoning and particularly of their interpretation of their NEPA responsibilities and duties. Appellants deliberately chose to avoid discussion of land-use impacts associated with pipeline construction as unnecessary and unreasonable on the one hand, and incredibly on the other, openly admitted throughout the Sale 40 EIS and PDOD that pipeline construction would certainly occur. In fact, Mr. Wenstrom again conceded that if an oil strike of significant magnitude is found, it would "certainly" be carried ashore by pipeline. (Tr. p. 2505). Again, no caveat or qualification with respect to the state-local prerogative to reject pipelines was mentioned by Mr. Weinstrom in this context.

The incongruity of federal appellants' interpretation of their NEPA duties to assess and disclose in detail the potential environmental impact of the proposed activity is painfully apparent. In short, appellants concede that pipelines will "certainly" be a critical part of OCS production, yet refuse to discuss the land-use and environmental implications associated with same, even within the easy to use context of their own high-low recoverable oil estimates. Dr. Mitchell, an acknowledged land-use and planning expert, found no real difficulty in assessing and disclosing these same impacts; yet BLM, with all the talent at their disposal, could not or perhaps rather would not, assess these impacts. The detail and ready availability of the information adduced through the testimony of Dr. Mitchell clearly indicates that BLM would not have had to engage

in the so-called "crystal ball" inquiry referred to by appellants.

By virtue of federal appellants' failure to adequately discuss the siting locations and impacts of pipeline landfalls and construction within state and local jurisdictions, in any real degree of detail (as provided, for example, by Dr. Mitchell), appellants have violated not only NEPA's mandate to do so under Section 102(2)(c), but have further violated Section 1500.8(a)(1) of the CEQ Guidelines which require "A Description of the proposed action, . . . a description of the environment affected, including information, summary technical data and maps and diagrams where relevant, adequate to permit an assessment of potential environmental impact by . . . the public." Section 1500.8 continues: "The amount of detail provided in such description should be commensurate with the extent and expected impact of the action, and with the amount of information required at the particular level of decision making."

As illustrated above, federal appellants fully "anticipated" and "expected" the construction and use of pipelines through state and local jurisdictions. Why then were not the associated impacts of same discussed in the detail "commensurate" with the admittedly enormous scope of the proposed OSC activity, onshore and offshore?

CEQ Guidelines further provide that:

"Secondary or indirect, as well as primary or direct, consequences for the environment should be included in the analysis. *Many major federal actions, in particular those that involve the construction or licensing of infrastructure investments . . .*" (i.e. pipeline construction) ". . . stimulate or induce secondary effects in the form of associated investments and changed

patterns of social and economic activities. Such secondary effects, through their impacts on existing community facilities and activities, through inducing new facilities and activities, or through changes in natural conditions, *may often be even more substantial than the primary effects of the original action itself.*" (§1500.8(a)(3)(ii)) (Emphasis supplied).

As pointed out above, federal appellants' own witness, Mr. Wenstrom, conceded that pipeline construction (which he stated would "certainly" occur) carried with it "severe land-use impacts"; yet, in his opinion, a discussion of these very impacts, especially in terms of the acreage necessarily committed, would not be "necessary" or "reasonable." For whatever the reasons, these impacts were, in fact, not discussed in the Sale 40 EIS.

Federal appellants' failure to not only adequately discuss those details of land-use impacts associated with pipeline construction, but also to seriously and meaningfully discuss the effects of a state decision to prohibit or severely restrict the location of pipeline landfalls, clearly and further violates Section 1500.8(a)(4) of the CEQ Guidelines which requires a detailed discussion of:

"Alternatives to the proposed action, including, where relevant, *those not within the existing authority of the responsible agency* . . . In each case the analysis should be sufficiently *detailed* to reveal the agency's *comparative evaluation* of the environmental benefits, costs and risks of the proposed action and each *reasonable* alternative."

Clearly, a discussion of a state's right to prohibit pipeline landfalls is "reasonable", especially in terms of its constituting an alternative to the "anticipated" construc-

tion of pipelines to transport the expected oil from the OCS onshore. In addition, federal appellants' argument that "... state land-use control", associated with pipeline construction, "... is the one least susceptible to prediction and analysis now" (federal appellants' brief, p. 14), because of the political "vagaries" involved in such a decision, loses its remaining impact in light of the above cited regulations.

Admittedly, a state-local decision to ban pipelines is "... not within the existing control of the responsible agency". This fact, however, has never been and cannot now be used to justify BLM's failure to discuss at least in some meaningful detail the environmental and land-use impacts resulting from and inherent in such a decision. The Sale 40 EIS is so replete with indicia of the assumption that pipelines will be used, that the specifically referenced language cited by appellants throughout their briefs must often be skewed and stretched beyond its obvious intent. In fact, the only place throughout the entire three volumes of the Sale 40 EIS where federal appellants even come close to making a clear and concise statement with respect to the right of a state to refuse pipeline landfalls, is in a footnote, not even with the text, on page 20 of Volume II.

None of the sentences or phrases cited by appellants, by any logical interpretation, constitutes a discussion of the issue upon which the lower court made its decision—particularly not in the detail required by NEPA §102(2)(c) and the CEQ Guidelines.

A simple comparison here is noteworthy. At volume II, page 46 of the Sale 40 EIS, it is stated: "The department is also committed to the concept of requiring transport of oil via pipeline, rather than allowing tanker transport"

and "... we do not feel tankering will be used and heavy spills result, but instead that pipelines will be used". (Id, Vol. I, pp. 30-31).

These and other examples cited by Justice Weinstein in his decision, when read together, lead to only one logical conclusion—indeed one found by the District Court as a matter of law and fact:

"Even after public hearings criticizing the lack of specificity in discussion of pipelines, there was no discussion and apparently no real awareness of the fact that state laws may severely restrict pipelines and related on-shore facilities." (Dec. pp. 62-63)

The "rule of reason", cited by federal appellants in their brief, at page 12, was first established in *EDF v. Corps of Engineers*, 429 F. 2d 1123 at 1131. It held that:

"In determining whether an agency has complied with Section 102(2), we are governed by the *rule of reason*, i.e., *we must recognize on the one hand that the Act mandates that no agency limit its environmental activity by the use of an artificial framework and on the other that the act does not intend to impose an impossible standard on the agency*. The court's task is to determine whether the EIS was compiled with *objective good faith and whether the resulting statement would permit a decisionmaker to fully consider and balance the environmental factors*." (Emphasis supplied.)

It is respectfully submitted that by deliberately limiting the scope of its environmental impact analysis to specifically exclude a discussion of pipeline corridor siting and associated land-use impacts as well as any meaningful discussion of the readily discernable environmental im-

plications of a state's decision to prohibit pipelines and related facilities, federal appellants have violated this "rule of reason". BLM, in effect, has limited its "environmental activity by the use of an artificial framework". (*Id.*, at page 1131).

Rather than having proved that the lower court abused its discretion, federal appellants have attempted to conceal the legal insufficiencies of the Sale 40 EIS behind the artificial framework of acknowledging an underlying assumption in and reliance upon pipelines on the one hand, and on the other, deliberately refusing to discuss in detail the implications of same for the state and local communities which will have to bear the economic and environmental brunt associated therewith.

In light of this serious deficiency, illustrated by the District Court, an injunction must logically issue at least until said deficiency is adequately remedied upon remand. Federal appeal courts have not been hesitant, where inadequate impact statements have been filed to enjoin the proposed action even where that action involves a "national energy crisis" or a "national defense issue". *Natural Resources Defense Council v. NRC*, — F. 2d —, Docket Numbers 75-4276, 75-4278 (2d Cir., May 26, 1976; *Natural Resources Defense Council v. Morton*, 485 F. 2d 827 (D.C. Cir. 1972); *Natural Resources Defense Council v. Callaway*, 524 F. 2d 79 (2d Cir. 1975); Accord, *People of Enewetak v. Laird*, 353 F. Supp. 811 (D. Hawaii, 1973).

To suggest that the proposed OCS activity can be enjoined at any point immediately prior or subsequent to production is naive and unrealistic, especially in light of the "irrevocability" of the commitment of enormous resources (economic as well as natural) which will have been and will soon be made.

A NEPA violation, particularly one which is as significant as that found by the District Court, must of its own force argue conclusively for injunctive relief; to find otherwise, would sanction conduct specifically prohibited by Congress.

The timing of the injunctive relief is critical. One can illustrate simply the urgency and immediacy of the need for injunctive relief by referring to an analogous situation in the field of medical research: Surely one could not logically argue that the "irreparable harm" of a surgical transplant of cancerous cells in the blood stream of a laboratory animal would not become imminent until some months or years later when the cells will almost assuredly metastasize, thus killing the subject. The irreparable harm occurs at the moment of transplant or, in this instance, upon the commitment of huge amounts of capital and natural resources. For it is at this moment that the real harm is committed, no matter how many years ensue before the ultimate harm becomes clearly manifested.

CONCLUSION

It is respectfully submitted that the decision and order of the District Court is proper in all respects and should, therefore, be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

76-6122

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On Appeal From The United States District
Court For the Eastern District of New York

Affidavit of Service By Mail

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

Louis Mark, being duly sworn, deposes and says: That he
is over twenty-one years of age: That on the 22nd day of
September 1976 he served two copies of the attached Brief Of
Appellee, County of Nassau, on each of the following named by
enclosing said copies in fully post-paid wrappers addressed as
follows and depositing same in The United States Post maintained
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Louis Mark

Louis Mark

Sworn to before me this
22nd day of September 1976

Quinton C. Van Wylen

QUINTON C. VAN WYLEN
Notary Public, State of New York
No. 24-4087465
Qualified in Kings County
Commission Expires March 30, 1977